ORIGINAL

RECEIVED

FEB 11 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the SBC Companies For Forbearance from Regulation As a Dominant Carrier for High Capacity Dedicated Transport Services In Specified MSAs	)	CC Docket No. 98-227

REPLY COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK"), respectfully submits its Reply Comments in opposition to the above-captioned Petition.[1] NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-two (22) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-six (36) markets in fourteen (14) states. As a direct competitor to SBC in California and Texas, NEXTLINK has a substantial interest in the outcome of this proceeding.[2]

I. Introduction

NEXTLINK supports the opposition of the majority of commenters to SBC's premature petition for forbearance.[3] Most commenters agree that SBC and other incumbent local exchange carriers ("ILECs") are attempting inappropriately to overwhelm the FCC with numerous

[1] See Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("Petition").

[2] NEXTLINK provides service in the following Metropolitan Statistical Areas ("MSAs") included in SBC's Petition: Los Angeles, California; San Francisco, California; San Jose, California; and Dallas/Ft. Worth, Texas.

[3] See e.g., AT&T Comments; Time Warner Comments; MCI WorldCom Comments; Sprint Comments; Hyperion Comments; KMC Telecom Comments; GST Telecom Comments; Association of Local Telecommunications Services ("ALTS") Comments; Competitive Telecommunications Association ("Comptel") Comments; and the Telecommunications Resellers Association ("TRA") Comments.

No. of Copies rec'd 0+4
List ABCDE

petitions requesting pricing flexibility. NEXTLINK urges the Commission to address this nationwide issue in its proper forum, the ongoing Access Charge Reform docket.[4] NEXTLINK also agrees with commenters that SBC has failed to provide real evidence of competition in its markets and that further, even if the Commission were to give any credence to the evidence submitted by SBC, it does not demonstrate that SBC has lost market power. In addition, SBC's pleading ignores its continuing failure, whether through its inability or a simple lack of effort, to provide competitors with nondiscriminatory access to SBC's local network infrastructure as required by the 1996 Act. As long as SBC retains a firm chokehold on local bottleneck facilities, SBC will continue to maintain market power in all related markets. If this Commission proceeds to consider SBC's petition on its merits, however, the Commission must not only deny the petition because it fails to satisfy the threshold statutory requirements necessary to secure forbearance relief, but because it is contrary to the public interest.

II. Pricing Flexibility Should Not Be Considered Apart From the Access Charge Reform Docket

NEXTLINK supports the numerous commenters that denounce SBC's effort to file a separate petition on issues that are essentially identical to those the Commission is currently considering in the Access Charge Reform docket.[5] NEXTLINK urges the Commission to resolve these issues in the proceeding it has already initiated, because otherwise ILECs will have the incentive to continue to flood the Commission with premature and inappropriate requests for relief, whether they are styled as petitions for forbearance, or other means of relief. In fact, in addition to SBC's current omnibus petition,[6] other ILECs have filed multiple petitions

[4] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

[5] See e.g., MCI WorldCom Comments at 4-5; KMC Telecom Comments at 4-6; Logix Communications Comments at 1-3; Time Warner Telecom Comments at 22-23.

[6] SBC explains that the Commission should, in fact, consider its petition to be fourteen separate petitions for relief, one for each of the MSAs it has identified. SBC Petition at n.4

concerning pricing flexibility that are identical to the issues already under consideration in the Access Charge Reform docket.[7] This disingenuous "shotgun" approach simply will exhaust the limited resources of the Commission and competitive carriers.

The competitive carriers filing comments in this docket also express serious concern regarding SBC's apparent strategy to overwhelm the Commission with the quantity rather than the quality of its pleadings.[8] In the past six months, not only has SBC filed this petition, but it filed comments presenting similar arguments in the Access Charge Reform docket and it filed a petition for similar relief in the Commission's biennial review of its regulations.[9] The Commission has already previously rejected SBC's attempts to do an "end run" around the Access Charge Reform docket.[10] The Commission should do so again.

Moreover, if it was not already clear, the multiple petitions for forbearance recently filed by ILECs demonstrate that issues relating to pricing flexibility are national in scope and should be considered by industry and regulators in the context of a comprehensive proceeding. In the Access Charge Reform docket, the Commission recently requested and received additional comments from parties, including SBC, specifically addressing the pricing flexibility issues raised in the instant petition.[11] The Commission should refuse to consider SBC's and other

[7] See e.g., Petition of U S WEST Communications, Inc. For Forbearance, filed August 24, 1998 ("U S WEST Phoenix Petition"); Petition of U S WEST Communications, Inc For Forbearance, filed December 30, 1998 ("U S WEST Seattle Petition"); Petition of Bell Atlantic For Forbearance, filed January 20, 1999 ("Bell Atlantic Petition"). Moreover these petitions and SBC's are remarkably similar in substantive arguments and the scope of evidence presented, including the company, Quality Strategies, Inc., that prepared all of the studies that purport to show that all of the above petitioners are non-dominant.

[8] See e.g., Hyperion Comments at 2-4; Logix Comments at 1-3; KMC Telecom at 4-6; Sprint Comments at 4.

[9] See also 1998 Biennial Regulatory Review – Petition for Section 11 Biennial Review, Notice of Proposed Rulemaking, CC Docket No. 98-177, FCC 98-238 (rel. Nov. 24, 1998) (SBC requested forbearance from regulation of high capacity services).

[10] See e.g., In the Matter of Southwestern Bell Telephone Company, Tariff FCC No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19313 (1997) (SWBT Tariff Order") (The Commission stated that it was already considering the pricing flexibility issues raised by SBC in the Access Charge Reform docket).

[11] Commission Asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility, Public Notice, FCC 98-256 (rel. Oct. 5, 1998).

ILECs' petitions for pricing flexibility outside of the Access Charge Reform docket where the Commission can most effectively address the numerous interrelated issues regarding proposed changes to the existing interstate access charge rules.

III. SBC Has Failed to Provide Sufficient Evidence Demonstrating Actual Effective Competition in its Monopoly Local Telephone Service Markets

SBC's petition is simply insufficient to demonstrate the overreaching claims that it makes. First and foremost, SBC has submitted a flawed study that fails to provide sufficient supporting evidence, including any underlying data, and therefore the Commission cannot rely upon this analysis.[12] Commenters provide compelling arguments that a revenue-based approach to measuring market share in the "high capacity" market would be more accurate and not surprisingly would demonstrate that SBC's share of that market is significantly higher than the capacity-based approach used in its study.[13] The study also fails convincingly to explain the existence of a single, separate "high capacity" market as SBC has defined it.[14] Not only does the study itself suggest the existence of separate markets for high capacity transport for exchange and exchange access services, but it also fails to distinguish between the provision of DS-1 and DS-3 services.[15] If the provision of DS-1 or exchange services is viewed separately, it is unlikely that SBC faces significant competition for these services because only SBC has the extensive local network infrastructure to provide them to all potential customers in an MSA.

Second, even assuming the Commission could rely on SBC's study, its results show that SBC has market shares between sixty-two and seventy-four percent in eight of the fourteen MSAs listed in its petition.[16] By any measure these markets clearly remain highly

---

[12] See e.g., Time Warner Comments at 13; Logix Communications Comments at 3-4.

[13] See Sprint Comments at 8-9; Logix Communications Comments at 4-5; MCI WorldCom Comments at 14. As many commenters explain, although one DS-3 equals 24 equivalent DS-1s in capacity, the revenues obtained from a DS-3 are approximately equal to the revenues from 12 DS-1s.

[14] See Time Warner Comments at 3-7.

[15] See Sprint Comments at 9-10.

[16] SBC Petition at 14-15.

concentrated.[17] In only two of the other six markets does SBC have a market share below even fifty percent and those are 49.4% and 49.3%.[18]

NEXTLINK also urges the Commission to reject SBC's unfounded suggestion that although competitive local exchange carriers ("CLECs") may not have actual access to many potential customers in an MSA, through further facilities build-out and greater use of SBC's unbundled network elements, CLECs would have access to most potential customers in an MSA.[19] SBC's claims regarding the ease and limited cost of further build-out for CLECs are surprising given SBC's claims in other proceedings that it cannot afford to build any facilities in new markets unless it is allowed to enter into one of the largest mergers in the history of the telecommunications industry.[20] The Commission should not allow SBC to rely on statements regarding the supposed ability of CLECs to quickly build out their networks to compete with SBC, when SBC itself has stated many times in proceedings concerning its proposed merger with Ameritech that without the combined resources of SBC and Ameritech it cannot afford to launch any competitive out-of-region services.

The simple fact remains that CLECs cannot simultaneously duplicate SBC's network overnight or anytime in the immediate future. NEXTLINK and other CLECs have invested tremendous resources into markets across the country to begin to provide competition in access markets. NEXTLINK has done so in some of SBC's markets. In no market, however, has NEXTLINK or any other competitive provider dislodged SBC, or any other ILEC, as the dominant provider of services in that market. The inherent advantages of the ubiquitous scope and scale of the ILECs' networks continue to present ILECs with tremendous advantages that preclude new entrants, as of yet, from providing market discipline to ILECs' provision of these

[17] In fact, in light of commenters criticisms of how SBC defined the market at issue and the manner in which SBC measured market share, it is likely that SBC's market share is significantly higher than indicated by its petition.

[18] SBC Petition at 14-15.

[19] See SBC Petition at 19.

[20] See Merger of SBC Communications, Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations (July 24, 1998).

services. The Commission has long recognized the existence of these incumbent advantages and carefully protected emerging competition in access markets from "foreclosure or deterrence to market entry by new entrants."[21]

Furthermore, ILECs continue to fight the market-opening requirements of the 1996 Act and Commission proceedings to promote and protect competition. As several commenters note, in no state has SBC met the market-opening requirements of Section 271.[22] It is disingenuous for SBC to tout CLECs' access to its local network as a means to compete, while SBC continues to fight its obligations to provide nondiscriminatory access to its network. To the contrary, unless and until SBC takes seriously its duty to provide nondiscriminatory access on just and reasonable terms and conditions under the Act, the Commission cannot expect CLECs to be able to rapidly attract and serve customers through the use of SBC's network. Basic SBC corporate decisions have severely limited CLECs' access to SBC's network elements. For example, SBC, contrary to the Act, requires CLECs to obtain a collocation cage in each and every single central office where a CLEC wants to obtain an unbundled loop.[23] Moreover, SBC provides these collocation arrangements to competitors for unreasonable, non-cost based rates and under onerous terms and conditions. Even if SBC provided collocation arrangements at reasonable rates, terms and conditions, however, the need for a CLEC to collocate in a central office before reaching a single customer connected to that office adds significant barriers to a CLEC's ability

[21] See SWBT Tariff Order at 19327.

[22] For example, no state commission has affirmatively found that SBC has met all of the items of the competitive checklist of Section 271. In fact, both the California Public Utilities Commission and the Texas Public Utilities Commission affirmatively found that SBC has not met several of the checklist items and that SBC needed to work harder at removing barriers to entry for new competitors. See Pacific Bell (U 1001 C) And Pacific Bell Communications Notice Of Intent To File Section 271 Application For InterLATA Authority In California, Final Staff Report, California Public Utilities Commission (October 5, 1998); Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Final Status Report on Collaborative Process, Project No. 16251, Public Utilities Commission of Texas (February 8, 1999).

[23] SBC's requirement that a CLEC only obtain unbundled network elements through collocation arrangements and SBC's refusal to provide CLECs with access to extended loops is further evidence of SBC's corporate policy to limit and discourage CLEC access to its network.

to quickly attract and serve existing SBC customers. Furthermore, assuming arguendo that a CLEC had the capital resources to invest in obtaining collocation cages simultaneously in every SBC central office, there is no question that SBC could not accommodate that request.[24]

The obvious lack of competition in the markets identified by SBC in its petition underscores another fatal flaw in SBC's petition. SBC is blatantly attempting to short-circuit the market-based approach to access charge reform previously adopted by the Commission in its Access Charge Reform proceeding. The current market-based approach has spurred substantial investment from CLECs into competitive facilities. In order for this market-based approach to continue to encourage competitive investment, however, the Commission must remain vigilant over the dominant ILEC providers of access services. If competition has not developed to the point where markets forces can effectively control ILEC pricing and other behavior, then the inherent dangers of monopoly control are still present. Whether for the industry as a whole, or for ILECs individually, therefore, it is critical for the Commission to continue to demand the elimination of market entry barriers before the Commission grants substantial pricing flexibility to ILECs.[25]

All of the pricing flexibility proposals presented to the Commission to date, including the instant petition, are reflective of the ILECs' desire to extinguish competition before it can firmly take root. Before the Commission can adopt any framework for pricing flexibility, it must require real evidence of substantial competition, including the elimination of critical barriers to entry in ILEC's monopoly markets.[26] Without effective competition in a market, ILECs will use pricing flexibility to attack those markets where the potential for competition at least exists, i.e., where a CLEC is present, and use pricing flexibility solely to destroy prospects for future

[24] SBC cannot even comply with its obligations under the Act with the current level of requests for collocation from CLECs which is significantly lower than the total number of SBC central offices.

[25] See Access Charge Reform Order at para. 266.

[26] Such barriers include: (1) ILEC control over bottleneck facilities and abuse of that power; (2) state and local regulations inconsistent with competition; and (3) additional barriers created by entities such as building owners, municipalities and utilities.

competition by undercutting any competitive offering that does emerge. The ILEC can engage in such predatory pricing because it can cross-subsidize lower anti-competitive rates with the continued revenue streams it receives from access charges in markets where there is not yet even the potential for the development of competition. Such predatory pricing might benefit a limited number of consumers in the short term, but clearly it would not be in consumers' best interests in the long run. Furthermore, SBC provides no information as to the percentage of its revenues that is derived from "high capacity dedicated transport services" and thus it is impossible to determine or analyze the extent to which it can use its monopoly revenues to offset predatory prices.

IV. SBC Does Not Meet the Standards for Forbearance under Section 10

NEXTLINK supports commenters that contend that SBC has failed to meet the statutory requirements for forbearance under Section 10.[27] NEXTLINK also believes the record already demonstrates that this premature grant of pricing flexibility to SBC would negatively impact overall consumer welfare, thwart emerging competition and completely undermine the Commission's market-based approach to access charge reform.

First, because SBC has unquestioned market power throughout its service territory, efforts to relax any aspect of dominant carrier regulation over SBC would in essence assist SBC to subsidize predatory pricing in identified markets by raising prices in other markets where SBC has an even greater market share by any measure. SBC can already lower prices in response to competitors under the Commission's existing "density zone" rules, however, to do so SBC must lower those prices in both markets where there is some competition and those where there is none at all.[28] The Commission's existing density zone pricing rules not only enable SBC to lower prices in response to competitive entry, but they also promote overall consumer welfare by requiring SBC to simultaneously lower prices in markets where some competition exists as well

[27] See e.g., AT&T Comments at 14-18; KMC Telecom Comments at 8-9.
[28] See 47 C.F.R. § 69.123.

as markets where competition has yet to arrive. The long term danger in SBC's requested relief is that it would arm the incumbent with the capability to drive out new entrants in small pockets of emerging competition while permitting SBC to enjoy the fruits of monopoly pricing in those markets where no competitive alternative exists. Such a result is completely contrary to the requirement of Section 10 that SBC show that regulation is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that service are just, reasonable and not unjustly or unreasonable discriminatory. SBC seems only to argue that it has little ability to maintain prices well above those of its competitors and that consumers will not be harmed if its petition is granted. SBC has completely failed to address its ability to cross-subsidize its high capacity services with revenue obtained from product areas in which it indisputably retains dominant market power.

Furthermore, a grant of SBC's petition would harm both the short and long-term interests of consumers. Although some customers in some markets may benefit from SBC's ability to charge lower prices, overall consumer welfare will be decreased because SBC will no longer have to make those rates available to all consumers in similar density zones. In the long-term, SBC's ability to predatorily price and cross-subsidize its services in the markets at issue in the petition will destroy CLECs' ability to compete and damage the long term prospects for sustainable, irreversible competition in these markets. That will only result in SBC's unfettered ability in all markets to charge supracompetitive rates.

Finally, the Commission has clearly articulated that pricing flexibility is an interrelated part of its efforts to reform the access charge rules. In addition to the above discussed harm to consumers and competitors that is clearly not in the public interest, a grant of this petition would immediately short-circuit the Commission's efforts to reform its access charge rules in the Access Charge Reform docket.

V. Conclusion

The Commission should dismiss SBC's petition for forbearance because it is an inappropriate attempt to circumvent the Commission's comprehensive rulemaking on reform of its interstate access charge rules. If the Commission chooses to consider SBC's petition on its merits, however, the Commission should deny SBC's petition because it is based on flawed and misleading evidence and fails to demonstrate that SBC lacks market power in the 14 MSAs identified in the petition. Furthermore, SBC's petition does not even address SBC's continuing lack of compliance with the market-opening requirements of the 1996 Act and SBC's resulting chokehold on local bottleneck facilities. SBC's petition does not meet the statutory requirements for forbearance and a grant of the requested relief would be contrary to the public interest. NEXTLINK, therefore, urges the Commission to reject SBC's petition.

Respectfully submitted,

By: R. Gerard Salemme /RGT

R. Gerard Salemme
Senior Vice President, External Affairs and Industry Relations
Daniel Gonzalez
Director, Regulatory Affairs
NEXTLINK COMMUNICATIONS, INC.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 721-0999

Daniel M. Waggoner
Robert S. Tanner
DAVIS WRIGHT TREMAINE LLP
1155 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 508-6600

Counsel for NEXTLINK Communications, Inc.

February 11, 1999

CERTIFICATE OF SERVICE

I, Tracey A. Bogans, a Legal Assistant in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Reply Comments of NEXTLINK" was served on the persons specified below, by U.S. Mail, First Class Postage Prepaid, on February 11, 1999:

William E. Kennard
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Lawrence E. Strickling
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Harold Watson
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Robert M. Lynch
Michael J. Zpevak
Thomas A. Pajda
SBC Communications Inc.
One Bell Plaza
Dallas, TX 75202

Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Jane E. Jackson
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Joel Taubenblatt
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Geoffrey M. Klineberg
Kellogg, Huber, Hansen, Todd & Evans, PLLC
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005

Patrick J. Donovan
Pamela S. Arluk
Logix Communications Corporation
KMC Telecom, Inc.
Swidler Berlin Shereff Friedman, LLP

3000 K Street, N.W.
Suite 300
Washington, DC 20007

Brian Conboy
Thomas Jones
Time Warner Telecom
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

Leon M. Kestenbaum
James W. Hedlund
Sprint Corporation
1850 M Street, N.W.
Washington, DC 20036

Alan Buzacott
Henry G. Hultquist
MCI Worldcom
1801 Pennsylvania Ave., N.W.
Washington, DC 20006

Mark C. Rosenblum
Peter Jacoby
Dina Mack
AT&T
295 North Maple Avenue
Room 3245H1
Basking Ridge, NJ 07920

Michael S. Pabian
Ameritech
Room 4H82
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
United States Telephone Association
1401 H Street, N.W.
Suite 600
Washington, DC 20005

James T. Hannon
Jeffry A. Brueggeman
US West Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Rodney L. Joyce
Shook, Hardy & Bacon, L.L.P.
Network Access Solutions, Inc.
1850 K. Street, N.W., Suite 900
Washington, DC 20006-2244

Susan M. Eid
Richard A. Karre
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20006

Barry Pineles
GST Telecom Inc.
4001 Main Street
Vancouver, WA 98663

Jeffrey L. Sheldon
UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, DC 20036

Tracey A. Bogans